No. 12,389

In The United States Court of Appeals

For the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

M. W. MOUAT, M. W. MOUAT, as trustee of an express trust, M. W. MOUAT, Administrator of the Estate of May Paula Mouat, deceased,

Appellees,

and

M. W. MOUAT, M. W. MOUAT, as trustee of an express trust, M. W. MOUAT, Administrator of the Estate of May Paula Mouat, deceased,

Appellants,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellee.

Brief of the Mouats as Appellees

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McKEE PRINTING CO. BUTTE, MONTANA

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We do not waive appellee's Motion that this appeal be dismissed.

REMOVING THE CORPORATE VEIL.

When the lease was executed, Metals Reserve Company was just the United States, Pro hac vice, the United States was Metals Reserve Company. Thereafter, RFC substituted by law was only the United States. Pro hac vice, the United States was RFC. War Assets Administration was the United States. The United States was War Assets Administration. The Forestry Department is the United States . The Department of the Interior (Bureau of Land Management) is the United States. The Federal Courts are the United States. Their power springs solely from the United States, but not to be interfered with by

any other branch of the Government. Some agencies through which the United States acts, and in which its sovereignty appears, are not subject to private suit in the courts. Until the Torts Claims Act, few United States agencies were subject to suit at all. But the Congress early became aware that injustice was sometimes done by these agencies to citizens. For redress of this, the Court of Claims was established.

The burden of litigation in that Court, due to the entry of the United States into many forms of work widely distributed, the burden and expense to citizens deeming themselves aggrieved, of presenting their evidence of their claims in the Court of Claims at the Capitol, impelled the Congress to partly surrender the immunity from suit of the United States when it chartered banks during the Civil War,—and later when itself entered the banking field, and other activities by chartering the Reconstruction Finance Corporation.

Those statements are axiomatic. They would compel and give firm support to the decision of this Court in United States vs. Shofner Iron and Steel Works, 168 Fed. 2nd, 286. Except that Metals Reserve Company, lessee, and RFC, substituted by law for it, were not immune from suit in the local United States District Court, the lease would be exactly the same if the lessee had been by name "The United States of America."

The case we think may be stripped of fine-spun logic, hard to follow, if we "pierce the corporate veil" where there is a single stockholder as is done in Montana. This contract was agreed to be construed by Montana law. We put the *entire* paragraph 24 before the Court with the substitution. It then would read:

"24. Anything in this Lease contained to the contrary nothwithstanding, any strike, lockout, difference with workmen, accident, fire, explosion, flood, earthquake, embargo, mobilization, war, foreign war, hostility, riot, requirement, regulation, restriction or other act of any government or governments, whether legal or otherwise, acts of public enemies, the elements, force majeure, inability to secure or delay in securing cars, labor, raw materials, fuel, or other supplies or material or electric power necessary for the operation of the leased premises or the operation of the *United States'* facilities, failure of the ore supply or loss of the ore body in the said leased premises or inability to secure sufficient ore of the grade required for concentrating from the said leased premises, unforeseen metallurgical or milling delays, delays or interruptions in transportation by rail, water or otherwise, damage to or destruction of such mines or plants or other operating facilities and any other contingency, whether or not the nature or character hereinbefore specifically enumerated, *which is beyond the control of the United States, or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for delay in such performance until such cause ceases to exist.*" (Italics ours.)

Then if the absolution from payment of minimum royalty claimed here can be sustained on this evidence, it must be based on an interpretation of the contract that the payment may be forgiven by an order of the lessee given to itself, i. e., by the mere will of the lessee, an event not *"beyond its control,"* as stated in the writing, but always in its control and power.

Thus the plaintiffs' property could be held under the lease without payment of rental, not for only 10 years, as mentioned in the appellant's brief, but for an additional

period of 10 years according to the renewal clause, par. 28 R. 32.

Of course, Mrs. Mouat's counsel must have examined the lease before it was executed, but it was prepared by counsel for the lessee, who says "That lease was not acceeptable to Reconstruction Finance Corporation, but I used it as a form for preparing the lease in evidence." 296 R.

Even if there were evidence of an affirmative order—(there is none) it would be hard to believe that it was the intention of the Government that there be set in the contract a snare for a 19-year lease without payment of any royalty. The act of the defendant in paying the first royalty of $10,000 before production commenced, would rebut such an intent of the parties. It might be easy to find a suggestion in some file postponing production until a tunnel encountered the vein.

The $10,000 annual minimum royalty clause was inserted, as we submit, to provide a consideration for holding the mines non-productive, unless the lessee were prevented from working them by a divinely caused Act of God, not by a manufactured "Deus ex machina" Act of God,—with the lessee as Deus in the machine.

As mentioned in the opinion of Judge Pray, "Lessee agrees to carry on its operations hereunder diligently." R 25.

Even if paragraph 24 stood alone for interpretation without reference to other parts of the contract, it would not be possible to construe it as appellant contends, because it would lead to such unreasonable result as to prevent any enforcement of this contract by the courts.

But the interpretation claimed for it has also to face a sentence isolated by a period.

> "7. Beginning January 1, 1943, *and thereafter during the term of this lease,* Lessee agrees to pay to, and deposit with the Yellowstone Bank at Columbus, Montana, to be paid by said Bank to May Paula Mouat, as Trustee, a minimum royalty of Ten Thousand Dollars ($10,000) per year, payable quarterly on or before thirty days after the end of each calendar quarter." (Italics ours.) R 23.

THE ALLEGED NECESSITY

The order which the appellant now claims was *compulsory* and prevented any further operation is of date September 13, 1943, signed by Mr. Batcheller. The objection to the introduction of Exhibit 7, R 156, should have been sustained.

The record seems silent as to whether or not the letter was ever delivered to the addressee. No postmark accompanied it. The Honorable Jesse Jones does not appear to have answered it. Its date was September 13, 1943. R 160. (The letter did reach Metals Reserve Company according to a letter to the Mouats of December 11, 1943, signed by Mr. G. Temple Bridgeman.) It was not regarded by Metals Reserve as an order, but only advice. Nine days after its date, G. Temple Bridgeman, Executive Vice President of the Metals Reserve Company, writes its operating company, Anaconda, about the letter now claimed to be an order. It is there called a "request." R 190. It was indeed, only a suggestion. Its closing paragraph is:

> "The question arises at this time as to whether it will be advisable to carry through from level to

> level a stope or two in both the "G" and "H" veins, as suggested by Mr. Browning. We should like to see this done if it can be conveniently fitted in with the general shut-down program. We shall appreciate your views in this regard." R 192.

Enough supplies were to be kept for an output of 2,000 tons per day. R 192.

A stope is an excavation for extracting ore as distinguished from a shaft, drift, airway. Webster's New International Dictionary.

> "Stope. The working above or below a level where the mass of the ore body is broken."
> Morrison Mining Rights, 16th Ed. 783.

That the shut-down was only of volition, not of compulsion, appears also from a telegram from Mr. Bridgeman to Anaconda, September 16, 1943, saying (among else):

> "Maintain sufficient men to keep entire plant in operating condition, and under ground workings in good repair. All arrangements of shut-down should be such that production can be resumed with reasonable promptness upon notice from us to re-open." R 189.

The lessee at this time seems to have interpreted the minimum royalty suspension that it applied to only a fraction of a year. Its president telegraphs Anaconda September 27, 1943, (among else):

> "Leases provide obligation pay minimum royalties shall be suspended during periods where a cause such as request of War Production Board exists and obligation pay such minimum royalties shall be reduced in such proportion as period suspension bears to entire calendar year."

About 12 workmen were at the upper camp March 1, 1946 and September 1, 1946. Evidence of Nicely, R. 246. It would be a harsh suspicion of waste of public money to think that such a force was not mining.

If it was the intention of the parties to the lease that a mere purpose of the lessee to hold the mines unproductive but in readiness to serve, for years at a time, would absolve the lessee from paying the minimum royalty, why insert before and after the words "requirement, regulation, restriction, or other act of government or governments, whether legal or otherwise" thirty-eight contingencies that might happen, and if any did happen a physical impossibility to produce from the mines would arise. The unwillingness of the lessee to operate would cover any of these contingencies.

What did happen, as is apparent from the correspondence of the administrative officers, was only that the sole stockholder of the lessee concluded that a sufficient supply of needed chrome could be obtained somewhere else at less expense. It was not an event usually held to be within a vis major clause in mining leases. To make a minimum royalty clause dependent on market conditions either of demand or supply is not usually permitted by the courts.

In substance the same administrative conclusion or plan might have arisen if such a large body of high-grade chrome had been discovered in the Ben Bow development five miles away as to supply the expected need.

The "Dead Rent" provision is frequent in mining leases, as is also a vis major paragraph with many particular contingencies set out beside "catch all" phrases. It is safe to say that when these contracts are being executed,

it is the intention of both parties that the Dead Rent clause shall operate unless some event happens to prevent production that is *actually beyond the control* of the lessee and ejusdem generis of the particular events enumerated.

The courts hold that the circumstances must be considered and a reasonable interpretation reached for the particular contract before the court.

Appellant claims that a mere expressed plan of the lessee to hold the property idle, but ready to produce on short order, would allow the lessee to hold possession for 19 years without the payment of the "dead rent."

Appellees submit that such an interpretation would be so unreasonable that the courts should not hold that there was any such intention in the mind of either party when the contract was written; that if the contract were known by lessors to be subject to such construction, Mouats would not have executed it, because as to them it might have been the sale of a life estate for the first payment of $10,000 annual rental.

The minimum royalty clause worked no hardship on the lessee (except that the war was a hardship on the Nation and every citizen). The lessee could surrender on short notice and payment of $1,000. At length it decided to do so, as to the payment of $1,000, but it did not surrender possession of the land voluntarily at all. The judgment ordered re-possession by Mouats. The Marshal enforced this after June 11, 1949, the date of the judgment. 397 R. RFC remained owner of the lease, R 41 (line 2 from bottom). The War did not influence RFC to hold over after its notice of termination. The War ended VJ day, August 15, 1945. The Marshal

ejected RFC for Mouats three years and ten months later. There was an act of detainer in open court. At the conclusion of the evidence November 14, 1948—

Maury asks for Writ of Restitution.

McKevitt opposes. R 356.

Only temporary conditions causing a shut-down were in the minds of the parties when paragraph 24 was placed in the contract. It ends "* * *; which is beyond the control of lessee, or which delays or interferes with the performance of this agreement, shall be considered sufficient justification for *delay* in such performance until such cause ceases to exist." R 31. The periods of delay (not absolution) are proportioned to calendar years. R 24.

If there had been a compulsory order "beyond control," etc., this seemingly applied only to an excess above 2,000 tons per day production. 199 R.

The fact that a lessee may abandon when he desires, favors an interpretation that he must pay "dead rent" (or minimum royalty) so long as he holds possession. Makins v. Shellenbarger (Okla.) 289 Pac. 716.

Some of the questions raised by RFC are answered by

THE MONTANA LAW

When a tenant gives notice of cancellation of a lease, or that possession will be surrendered to the landlord by a certain date, a statute of Montana is as follows:

> "If any tenant gives notice of his intention to quit the premises, and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during the time he continues in possession after such notice."

Sec. 8694 R. C. M., 1935.

The Supreme Court of Montana has spoken to the effect that as against public officers, the trebling feature does not apply; doubtless that would be the Montana holding as to penalty in a case involving the RFC,—there would be no trebling (and here there is no trebling), but no modification has been made that the tenant is free of liability for rent during the period of hold-over.

Another statute of Montana in the case of unlawful detainer separates damages from rent:

> "The jury, or the court if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant, guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due."
>
> 9901 R. C. M., 1935.

> "Whatever remedies the lessor of any real property has against his immediate lessee for the breach of any agreement in the lease, or for recovery of the possession, he has against the assignees of the lessee, for any cause of action accruing while they are such assignees, except where the assignment is made by way of security for a loan, and is not accompanied by possession of the premises."
>
> Sec. 6764 R. C. M., 1935.

> "The attornment of a tenant to a stranger is void unless it is made with the consent of the landlord, or in consequence of a judgment of a court of competent jurisdiction."
>
> 7748 R. C. M., 1935.

"No one can take advantage of his own wrong." 8746 R. C. M., 1935.

The landlord has the option of treating the hold-over tenant as still a tenant or as a trespasser; the tenant continuing the wrong has not the election. The case cited in the brief of the RFC, O'Connor v. United States, 155 F. 2nd, 425, was a condemnation suit. It has no persuasive effect in an action between landlord and tenant for an unlawful detainer. There had been no preliminary agreement as to a minimum rental in the O'Connor case. We think that no authority can be found to the effect that where a tenant is guilty of an unlawful detainer, the election is with the tenant to class himself as a trespasser and litigate as to the value of the possession of the property during the hold-over period; that he cannot do so are the following authorities:

Clapp vs. Noble, 84 Ill. 62;

Tiffany—Landlord and Tenant, par. 213;

A. H. Fetting Mnfg. Co. vs. Ada R. Waltz, et al., 71 A. L. R., 1443;

St. Marks Ave. Corp. vs. Finkelstein, 253 N. Y. Sup. 785;

Edwards vs. Stebins (Okla.) 238 Pac. 474;

McKnight vs. United States, 64 Court of Claims, 291.

(There is not set of Court of Claims decisions in Montana. The case is so apt that we are inquiring whether the Court's Library lacks such a set? If it does, we will send the Clerk photostatic copy obtained from West Publishing Co. of this decision.)

"Where Government gives lessor notice of surrender of premises, but continues to occupy them, lessor is entitled to a rent at stipulated rate for entire occupancy."

The Mouats elected to have rent, as seen from the prayer of their complaint:

"For the sum of Thirty-one Thousand, Six Hundred, Sixty-six and 66/100 Dollars ($31,666.66) for rents as aforesaid." 13 R.

"In order that a party shall be excused from performing his contract obligation by an absolving clause contained in the contract, the excuse must not only come within the terms of such clause, but also must be reasonably beyond the power of the party to prevent,—that is, such a clause will not give a party the power arbitrarily to refuse performance, but he is under a duty to exercise a reasonable amount of care to prevent the happening of the contingency named. To excuse perforamnce under an absolving clause in a contract, the cause relied on must also be the proximate cause of the failure to perform."

12 Am. Jur., par. 365.

The proximate cause of failure to perform was a supply of chrome elsewhere deemed better.

We select from the many decisions relating to the interpretation of absolving clauses two that we think would interest the Court above many others; one as to a dead rent, or minimum royalty in a mining lease:

New York Coal Co. vs. New Pittsburg Coal Co., 99 N. E. 198;

Swift & Co. vs. Columbia Ry., etc., Co., 17 Fed. 2nd, 46.

The RFC claims immunity for paying rent during the hold-over because the lease gave it the right to *extract ore from the property, as well as possession.* The argument seems to us to fall if we invert the sentence. The lease gave RFC possession of 25 mining claims, in addition to the right to extract ore.

That rent and royalty have the same meaning, see

Reynolds vs. Hanna, 55 So. 783;

Kisick vs. Bolton, (Ia.) 112 N. W. 95;

United Gas Co. v. Barrett, La. App. 179 So. 506;

Wagner Supply Co. v. Bateman, (Tex.) 118 S. W. 2nd 1052;

McIntyre, as Adm. v. Bond, (Ky.) 13 S. W. 2nd, 772;

Smith v. Schlittier (Tex.) 66 S. W. 2nd, 353;

Elsinore Oil Co. v. Signal Oil Co. Cal. App. 40 Pac. 2nd 523;

State ex rel. Susquehanna Ore Co. v. Bjornson, (Minn.) 259 N. W. 392.

Just as this Court removed the corporate veil where the United States was the owner of all the stock in the corporation, in United States v. Schofner Iron, etc., Co., 168 Fed. 2nd, 286, so the Montana Supreme Court has done in Barnes vs. Smith, 48 Mont. 308, 137 Pac. 541.

The appellees have moved the Court to dismiss the appeal of Reconstruction Finance Corporation, appellant here. We do not waive that motion; we submit that it is well taken; that this appeal is premature and should be dismissed. If the Court holds that we are in error in that regard, we submit that the judgment should be affirmed.

Respectfully submitted,

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